80-1784

Office-Supreme Court, U.S.
FILED
APR 24 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term ,1981

No. ———

JAMES L. CALHOUN,
Petitioner,

vs.

BENJAMIN L. BAILAR, Postmaster General of the United States, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOWARD MOORE, JR.
The London Building
160 Franklin Street
Oakland, California 94607
Attorney for Petitioner

April, 1981

QUESTIONS PRESENTED

Did the Court of Appeals improperly extend the decision of this Court in Richardson v. Perales (1971) 389 U.S. 402, to permit hearsay evidence offered through ex parte affidavits of non-expert witnesses to whom bias could be ascribed to be received in evidence to sustain the removal of a federal employee from the Federal Service and thereby deprive the petitioner of due process of law in violation of the Fifth Amendment, United States Constitution?

Petitioner contends that the Court of Appeals' holding directly conflicts with the decision of this Court in Richardson v. Perales, supra, and that it extends that decision to a factually different and inappropriate context.

PARTIES

JAMES L. CALHOUN, Petitioner

BENJAMIN F. BAILAR, PostMaster General of the United States; JOSEPH P. MORRIS, Regional PostMaster General, Western Region; ALAN J. CAMPBELL, Chairman, United States Civil Service Commission; Appeals Review Board; DONALD B. HOFFMAN, Regional Director, United States Civil Service Commission, Western Region; LIM P. LEE, San Francisco Section Center, PostMaster, Respondents.

INDEX

	Page
Questions Presented	i
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Statement of the Facts	6
A. Background	6
B. The Administrative Hearing and the Decision of the Federal Appeals Authority (FEAA)	7
C. Decision of the Appeals Review Board	11
D. Proceedings in the District Court .	12
E. Proceedings in the Court of Appeals	12
Reasons for Granting The Writ	13
THE DECISION OF THE COURT BELOW RAISES AN IMPORTANT QUESTION CONCERNING THE PROBATIVE EFFECT TO BE ACCORDED HEARSAY EVIDENCE FROM NON-EXPERT WITNESSES IN ADMINISTRATIVE PROCEEDINGS WHICH WAS NOT DECIDED IN RICHARDSON v. PERALES (1971) 402 U.S. 389, AND THE DECISION BELOW IS EVEN IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN RICHARDSON v. PERALES, supra.	13
Conclusion	32
Appendix	1a

TABLE OF AUTHORITIES

Cases:	Page
Arnett v. Kennedy (1974) 416 U.S. 134	14
Barenblatt v. United States 360 U.S. 109	14
Consolidated Edison Co. v. NLRB	23,24
Goldberg v. Kelly (1970) 397 U.S. 254	29
Henley v. United States (M.D.Pa, 1974) 379 F.Supp. 1044	14
McKee v. United States 500 F.2d 525, 528	23
Murphy v. Waterfront Com'n (1964) 378 U.S. 52	26
NLRB v. Bausch & Lomb, Inc. (C.A.2, 1975) 526 F.2d 817, 822	25
NLRB v. Payless Chashway Lumber Store (C.A.8, 1974) 508 F.2d 24, 27-28 . .	25,26
Ong v. Tovey (C.A.9, 1977) 552 F.2d 305	14
Richardson v. Perales (1971) 402 U.S. 389	passim
Wilkinson v. United States (1961) 365 U.S. 399	14
Willapoint Oysters Inc. v. Ewing (9th Cir. 1949) 174 F.2d 676, 691 .	23

	Page
Statutes:	
5 U.S.C. 701	4
5 U.S.C. 706	2, 4
28 U.S.C. 2201 and 1361	4
28 U.S.C. 1254(1)	2
Other Authorities:	
Davis, Administrative Law Treatise . .	3
Federal Personnel Manual (FPM)	16
Pub.L. 89-554, Sept. 6, 1966 80 Stat. 393	3
Rule 52(a) F.R.C.P.	12
Rule 56 F.R.C.P.	4

No. 80-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

==========

JAMES P. CALHOUN,

Petitioner,

v.

BENJAMIN F. BAILAR, PostMaster General of the United States, et al.

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

==========

The petitioner, JAMES P. CALHOUN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceedings on August 27, 1980. The opinion of the Court of Appeals is reported at 626 F.2d 145 and is set out in the Appendix hereto at 1a. The order of the Court of Appeals denying the petition for

rehearing was entered on January 6, 1981, is as yet unreported and is set out in the Appendix hereto at a. The order of the District Court, entered February 28, 1978, granting respondents' motion for summary judgment and denying petitioner's motion for summary judgment is as yet unreported and is set out in the Appendix hereto at 20a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1981. On March 30, 1981, Mr. Justice Rehnquist granted petitioner's motion for an extension of time in which this petition for writ of certiorari could be filed through and to include April 24, 1981. Jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706, 5 United States Code, provides, in pertinent part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or,
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

STATEMENT OF THE CASE

This case reaches this Court through an appeal from the United States District Court for the Northern District of California to the United States

Court of Appeals for the Ninth Circuit. The appeal was taken by notice of appeal filed on March 8, 1978. (R. 105). The appeal was from the final order and judgment granting the respondents' motion for summary judgment and denying the petitioner's motion for summary judgment. (R. 104).

On July 4, 1977, the petitioner commenced an action pursuant to various Titles of the United States Code (5 United States Code, §§ 701 and 706, and 28 United States Code, §§ 2201 and 1361), to review a final decision of the United States Civil Service Commission, Appeals and Review Board, rendered on July 25, 1975, to affirm the decision of the Civil Service Commission, San Francisco Field Office, San Francisco Section Center, sustaining an order to dismiss petitioner as Acting Superintendent, Tour II, United States Post Office, San Francisco, California, Rincon Annex Facility. (R. 1-6).

On December 22, 1977, the respondents filed their motion pursuant to Rule 56, Federal Rules of Civil Procedure. (Docket entries, Item 14).

On January 30, 1978, the petitioner filed his motion for summary judgment, also pursuant to Rule 56. (R. 40).

On February 10, 1978, the respective motions for summary judgment as well as petitioner's motion to compel discovery were heard in the District Court. (Docket entry 29). Following the hearing, the District Court Judge announced his intended decision to grant respondents' motion for summary judgment and denying petitioner's motion for summary judgment. (Ibid.).

On February 28, 197o, a final order and judgment was entered granting and denying the respective motions for summary judgment. (R. 103-04).

On August 27, 1980, the Court of Appeals entered its decision to affirm the judgment. The Court of Appeals held that "hearsay evidence admitted without objection or later motion to strike may constitute substantial evidence in like manner as any other evidence." (Appendix at 12a.) On September 10, 1980, petitioner filed a timely petition for rehearing in which petitioner contended that the decision of the Court of Appeals was in direct conflict with the controlling decision of this Court in Richardson v. Perales (1971) 402 U.S. 389. On September 19, 1980, the Court of Appeals directed the respondents to reply to the petition for rehearing, and, on

January 6, 1981, the Court of Appeals issued its order denying the petition for rehearing. (Appendix at 16a.)

STATEMENT OF FACTS

A. Background

Petitioner was discharged from his position as Acting Tour II Superintendent at Rincon Annex of the San Francisco, California Post Office, effective July 8, 1974. The basis of petitioner's discharge rested primarily on the allegation that while acting in his official capacity as Acting Tour II Superintendent at the Rincon Annex he issued instructions and/or caused the falsification of Postal Source Data System (PSDS)/Work Load Recording System (WLRS) mail volume records. Specifically, it was alleged that petitioner had directed Clerks William W. Gaffey, William A. Scroggins and Carol Whitley to falsify PSDS/WLRS mail volume records and that petitioner promised Clerk Scroggins unlimited overtime for doing so, and promised Clerk Gaffey higher level pay and Quality Step Increases for his cooperation. Pursuant to an appeal submitted to the U.S. Civil Service Commission, San Francisco Field Office

in petitioner's behalf by his then counsel, Clarence Wilridge, Esquire, an administrative hearing was held before Assistant Appeals Officer David L. Biggers on September 12 and 13 of 1974.

B. The Administrative Hearing and the Decision of the Federal Employee Appeals Authority (FEAA).

The affidavit of Clerk Scroggins, submitted into evidence by the Postal Service, stated essentially that the petitioner had, as charged, directed Clerk Scroggins to falsify mail volume records and that he was promised unlimited overtime for his cooperation.

On direct examination, though, Clerk Scroggins denied that the petitioner had either directed him to reweigh mail or weigh dispatches that were going out of the building, or promised him overtime in return for the falsification of mail records. (T.R. 299:2-24).

Clerk Scroggins declined to answer a number of questions on cross-examination, asserting repeatedly, "I have been advised by my counsel not to answer any questions regarding my involvement in the case." (T.R. 302:12-13). For this specific reason, the FEAA concluded,

> Since the purpose of cross-examination is to test the credibility of the witness and the truth of his statements made on direct examination, and the witness did ... claim any recognized privilege, his refusal to answer relevant questions put to him by the agency demonstrates his lack of credibility. We conclude the witness' affidavit is the more credible evidence. (R. 63, San Francisco Field Office Decision) (Emphasis added)

The affidavit of Clerk Gaffey submitted into evidence by the Postal Service, again, stated essentially that the petitioner had, as charged, directed him to falsify mail volume records and that he was promised higher level pay and Quality Step Increases for said cooperation.

On direct examination, though, Clerk Gaffey denied that petitioner promised him higher level pay and a Quality Step Increase for falsifying mail records. (T.R. 288:16-24). When asked by the Hearing Officer if he wished to correct or repudiate any other portions of his affidavit, Clerk Gaffey indicated in the affirmative, but upon the advice of counsel, declined to be specific on the grounds of possible self-incrimination. (T.R. 294-295).

The FEAA concluded,

> We do not find the inconsistencies between the witness' affidavit and testimony as to whether or not the [petitioner] promised him a reward for falsifying mail records, sufficient basis to disqualify the affidavit for lack of credibility on the part of the witness. (R. 64, Ibid.) (Emphasis added)

Clerk Whitley's affidavit stated too, as charged, that petitioner had directed her to falsify mail volume records.

On direct examination she denied that petitioner had either directly or indirectly caused her to inflate PSDS or WLRS records. (T.R. 337:25; 338:5). And, it should be noted as well, that Clerk Whitley testified to the following:

1. That the interview with the postal inspectors lasted six hours. (T.R. 330:6-18).
2. That she was told by the Inspectors that the interview was long because she was a "tough nut to crack." (T.R. 330:19-23).
3. That she asked but was not allowed to go to the bathroom--even though she was bleeding (menstruation). (T.R. 332:9-25).
4. That upon reviewing her affidavit she told the Inspectors that it contained

statements which she simply had not made. (T.R. 335:1-3).

5. That the Inspectors told her what corrections to make on her affidavit. (T.R. 343:4; 344:6).

6. And finally, she testified, "I would have signed my death warrant [at that time. I was a] nervous wreck [and only wanted to go home]." (T.R. 336:3-10)

Postal Inspector Russell D. Johns, who prepared statistical summaries of mail volume data, testified that the mail volume at the Rincon Annex was excessively high while the petitioner was Acting Tour II Superintendent and that in May, June and July of 1974, after the petitioner was removed from his position, there was a substantial drop in mail volume. On cross-examination, however, Mr. Johns conceded that during the summer months there is always a volume drop at all facilities. And, although information was requested for mail volume figures covering the period just prior to the petitioner's tenure as Acting Tour II Superintendent, this additional data was denied petitioner.

The affidavits of Douglas Fox and Alexander Kleinman, who did not testify at the hearing,

submitted into evidence by the Postal Service, described essentially specific instances when they allegedly personally observed the petitioner's involvement in mail volume falsifications. Said allegations, not corroborated by any other evidence submitted by the Postal Service, were refuted by the petitioner himself on direct examination. (T.R. 364-370).

Finally, Ms. Mildred Coulter, for the Postal Service testified essentially that the petitioner allowed Mr. Scroggins to work overtime even though his services were not needed.

On cross-examination, though, she testified that she was not familiar with the duties performed by Mr. Scroggins. (T.R. 274:6; 275:14).

It was based on the foregoing that the FEAA concluded that the charges were sustained by the preponderance of the credible evidence, and that discharge was not arbitrary, capricious or unreasonable.

C. Decision of the Appeals Review Board

The Appeals Review Board, in a decision dated July 25, 1975, affirmed the FEAA determination that petitioner was properly discharged from his position with the Postal Service.

D. Proceedings in the District Court

The respondents moved for summary judgment on the grounds that the record of the administrative agency showed that its decision to remove petitioner from his employment was supported by substantial evidence. (Docket entry 14).

At the hearing on the respective motions, the District Judge stated that the affidavits of Fox and Kleinman, together with the portions of the affidavits, which were not repudiated by the other affiants during the administrative hearing, constituted substantial evidence to support the administrative decision. (R. 9). The District Judge decided the case on the merits, rejecting the respondents' argument that the action was barred by the doctrine of laches. Entry of formal or informal findings of fact or conclusions of law was not required. See Rule 52(a), Federal Rules of Civil Procedure.

E. Proceedings In the Court of Appeals

The Court of Appeals held that, "Because the affidavits questioned here were admitted into evidence without objection, were not subject of a motion to strike, and had 'rational probative force' (See

Richardson v. Perales (1971) 402 U.S. 389, 407-408), we now affirm." (Appendix 2a). The Court of Appeals did not apply the standards set forth by this Court in Richardson v. Perales, supra, to the actual facts of the case and ignored the fact that the questioned affidavits were never in fact offered as evidence in the administrative proceedings. Petitioner pointed out these omissions to the Court of Appeals in his petition for rehearing. Nevertheless, the Court of Appeals adhered to its earlier opinion and treated petitioner's criticisms of its opinion as untimely claims which if entertained by that Court would undermine the orderly process of appellate review. (Appendix at 19a)

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW RAISES AN IMPORTANT QUESTION CONCERNING THE PROBATIVE EFFECT TO BE ACCORDED HEARSAY EVIDENCE FROM NON-EXPERT WITNESSES IN ADMINISTRATIVE PROCEEDINGS WHICH WAS NOT DECIDED IN RICHARDSON v. PERALES (1971) 402 U.S. 389, AND THE DECISION BELOW IS EVEN IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN RICHARDSON v. PERALES, supra.

The writ of certiorari may appropriately be granted to review a decision of a Court of Appeals which con-

flicts with a decision of this Court or which improperly extends a decision of this Court to a materially different factual context. See Wilkinson v. United States, (1961) 365 U.S. 399, at 401, to review improper application of Barenblatt v. United States, 360 U.S. 109.

This case squarely raises the issue of whether or not the due process clause of the Fifth Amendment to the United States Constitution prohibits the termination of a federal employee's employment on the ground of misconduct where proof of such misconduct is based entirely upon the hearsay statements of non-expert witnesses.

The petitioner's interest in his employment with the United States Postal Service is a protected liberty. Arnett v. Kennedy (1974) 416 U.S. 134; and Ong v. Tovey (C.A. 9, 1977) 552 F.2d 305, at 307. As such, the removal of the petitioner from his employment on the basis of evidence which is inadequate or incompetent as a matter of law to constitute substantial evidence violates petitioner's right to due process of law under the Fifth Amendment. See, Henley v. United States (M.D. Pa., 1974) 379 F.Supp. 1044.

In Richardson v. Perales, supra, this Court held

that when certain enumerated conditions exist the written reports of medical experts may be received in evidence in a Social Security disability determination proceeding and may constitute substantial evidence, although such reports constitute hearsay. For this case, it is sufficient to note weighty practical differences between Richardson and this case to argue that the Richardson rationale should not have been extended to cases of this character.

Pragmatic considerations of administrative necessity and efficiency which factored in Richardson v. Perales, supra, are not crucial in this case. In Richardson, Mr. Justice Blackman noted that:

> The [Social Security Administration's] administrative structure and proceedings, with essential determinations numbering into the millions, are of a size and extent difficult to comprehend. (402 U.S., at 399)

Here, the removal of employees is not so commonplace that the machinery for determining the existence of good cause would become ineffective if the agency were precluded from relying entirely upon the affidavits of non-expert witnesses. Nor does this action involve determinations to extend proposed benefits in which the due process clause might countenance a more relaxed standard of proof.

Rather, the personal liberty interest at stake here involves actual and immediate infliction of "grievous loss" by the withdrawal of accrued benefits which commands a more rigorous standard of proof. In the context of the "grievous loss" of employment, the application of a rigorous standard of proof impacts upon administrative practices which have historically been structured to accommodate limits of a judicial character upon its operations. See, Federal Personnel Manual (FPM), Chapter 752, Adverse Actions by Agencies.

It should be noted that the decision to inflict "grievous loss" by the termination of employment is the product of the agency acting in an adversarial capacity and not as an impartial adjudicator which tips the balance in favor of a higher quality of proof.

The Court of Appeals gave no apparent weight or consideration to the important liberty interest at stake and cavalierly extended Richardson v. Perales, supra, to employee discharge cases and approved the use of ex parte affidavits to sustain the agency's burden of showing that the decision to discharge was based upon substantial evidence. In its order denying

rehearing, the Court of Appeals commented that:

> ... ex parte affidavits could not be used to determine the existence of substantial probative evidence where they were inconsistent with other evidence or where the court could find bias in the affidavits' source. This is a misstatement of the holding in that case. Rather, Perales states the rule that in the administrative hearing context hearsay is admissible if it is reliable and probative. Richardson v. Perales, supra at 407-08. (Appendix at 17a and 18a)

The Court of Appeals failed to acknowledge that this Court was addressing itself to a particular specie of hearsay evidence, affidavits of medical experts. As this Court noted in Richardson, "... the reliability and probative worth of written medical reports even in formal trials ... have admitted them as an exception to the hearsay rule." (389 U.S. at 405). Further, as this Court again noted in Richardson, Courts of Appeals had uniformly recognized reliability and probative value in such reports." (Ibid). This Court clearly did not sanction either the receipt of non-expert hearsay affidavits into evidence in administrative proceedings nor approve their use to constitute substantial evidence.

The decision of the Court of Appeals is in direct

conflict with this Court's decision in Richardson. This Court held in Richardson that ex parte affidavits could not be utilized to determine the existence of substantial evidence where they were inconsistent with other evidence or where courts could "ascribe bias" to the source of the evidence. (402 U.S. 402-04). The hearsay evidence in this case was both inconsistent with the direct testimonial evidence, bias could be ascribed to the sources of such evidence, and it lacked "rational probative force."

Each of the three affiants was an admitted participant in the alleged false mail weighing scheme; as participants in the unlawful enterprise, each of them had an apparent bias and interest. Therefore, the hearsay evidence derived from consideration of any of their affidavits did not satisfy the first enumerated precondition for the receipt of hearsay evidence set forth in Richardson v. Perales, supra, 402 U.S. at 402. There, this Court held that to "assure underlying reliability and probative value" of hearsay evidence, courts must not be able to "ascribe bias" to the source of the evidence. (Ibid.)

Clerk Scroggins denied on direct examination that the petitioner had promised him overtime in return for

falsification of mail records, and denied that the petitioner had directed him to reweigh mail or weigh dispatches that were going out of the building. (T.R. 299:2-24). But the respondents asserted nevertheless that Clerk Scroggins' affidavit (which states essentially that the petitioner directed him to falsify mail volume figures) was independently corroborated by other probative evidence adduced at the administrative hearing: (1) Inspector Johns - "... he observed Mr. Scroggins arbitrarily write down some 30 to 40 different two digit numbers indicating that he had dispatched hundreds and hundreds of trays and racks of mail." (2) Films taken by the U.S. Postal Service "clearly show the witness [Scroggins] weighing mail for dispatch out of the San Francisco Post Office, weighing dispatch into operations 035, 040, 043, 150 and 160."

The "other" evidence suggests at most that Clerk Scroggins himself was participating in a mail volume falsification scheme. There is no suggestion whatsoever, as alleged in the charges against petitioner, that any falsification, if it in fact existed, took place at his direction.

With regard to Clerk Gaffey's affidavit, the

respondents noted that,

> the aspect of the affidavit specifically repudiated by Gaffey did not disqualify his affidavit en toto because it bore no relation to the issue raised by plaintiff's appeal." (R._____)

Clerk Gaffey repudiated on direct examination one of the very allegations for which the petitioner was discharged, that he promised Clerk Gaffey overtime and a quality step increase for falsifying mail records. (T.R. 288:16-24).

Similarly, Clerk Whitley, on direct examination, and contrary to her affidavit, denied that the petitioner had either directly or indirectly caused her to inflate PSDS or WLRS records. (T.R. 337:25-338:5). Indeed, one is hard pressed to avoid the inevitable conclusion, that the hearsay statements in question here are unreliable. All three affiants, when giving their respective statements, were themselves the subjects of investigation by the Postal Inspection Service. It is entirely logical to conclude that the affiants had a personal interest in giving statements which would tend to save their jobs by implicating

their immediate supervisor.[6/]

The respondents further asserted that the administrative record in this case contains statistical analysis prepared by Postal Inspector Russell D. Johns which furnish additional evidentiary support that petitioner engaged in the misconduct upon which his discharge was based. Even conceding, as found by the FEAA that such evidence,

> compels a finding that large scale falsifications were occurring during the plaintiff's tenure on Tour 2 at the Rincon Annex,

that evidence is yet deficient with regard to whether or not the petitioner was responsible for those falsifications.

6/ Clerk Whitley testified significantly: (1) that the interview by the Postal Inspectors lasted six hours (T.R. 330:6-18); (2) that she was told by the Inspectors that the interview was long because "she was a tough nut to crack." (T.R. 330:19-23); (3) that she asked but was not allowed to go to the bathroom--ven though she was bleeding (menstruation) (T.R. 332:9-25); (4) that upon reviewing her affidavit she told the Inspectors that it contained statements which she simply had not made (T.R. 335:1-3); (5) that the Inspectors told her what corrections to make on her affidavit (T.R. 343:4-344:6); (6) and finally, she testified: "I would have signed my death warrant [at that time]. [I was a] nervous wreck [and only wanted to go home]." (T.R. 336:3-10)

The testimony of Inspector Johns tended to indicate that there was a period in February, March, and April of 1974, while the petitioner was Acting Tour Superintendent, when mail volume at the Rincon Annex was excessively high. Further testimony tended to indicate that in May, June, and July of 1974, after the petitioner was removed from his position, there was a substantial drop in mail volume. However, on cross-examination, Mr. Johns conceded that during the summer months there is always a volume drop at all facilities. And, although information was requested for mail volume figures covering the period of February, 1973 to July, 1974, this period being critical to show whether the same growth pattern was evident during the administration of other tour superintendents, this additional data was denied the petitioner.[7/]

It is noted that affidavits executed by Alexander Kleinman and Douglas Fox were submitted into evidence

---

7/ Besides the inference that other tour superintendents of other administrations may have been responsible for the falsification for which the petitioner was discharged, it should be noted that while the petitioner was the acting tour superintendent, there were two other tour superintendents, during the same administration and on the same tour, who may in fact have been responsible for the acts charged the petitioner.

and that these affidavits described specific instances when the petitioner was allegedly involved in mail volume falsifications. But it should be emphasized here that the agency failed to produce any evidence which would support those hearsay allegations. Indeed, said allegations were refuted by the petitioner himself on direct examination. "...(M)ere hearsay lacking sufficient assurance of its truthfullness is not substantial evidence to overcome the sworn testimony of a claimant." McKee v. U.S., 500 F.2d 525, 528.[8/]

Finally, the respondents contended in the Court below that,

> Ms. Mildred Coulter testified that [appellant] fulfilled his promise to compensate Clerk Scroggins for participating in the mail volume falsification scheme by allowing Mr. Scroggins to work overtime even though his services were not needed. (R. _____)

Not only did Ms. Coulter testify that she was not familiar with the duties performed by Mr. Scroggins (T.R. 274:6; 275:14), there is also nothing in her testimony to support the bald assertion made by the

8/ See also Consolidated Edison Co., v. NLRB, supra; Willapoint Oysters Inc. v. Ewing (9th Cir. 1949) 174 F.2d 676, 691.

respondents that such overtime resulted because petitioner had in fact promised Clerk Scroggins compensation for participation in a mail volume falsification scheme.

The administrative record is quite clear. Other than the hearsay evidence submitted in this matter by the Postal Service, there is no other evidence to support these administrative findings of fact. "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (Consolidated Edison Co. v. NLRB, supra.)

The administrative decision to terminate petitioner's employment cannot be saved by treating the resort to and reliance upon hearsay as mere credibility determinations of the agency. Indeed, credibility determinations are the prerogative of the agency as fact finder; however, the so-called credibility determinations made by the agency in this action are legally incorrect. They do not give any manifest recognition of the realities of the practice of judicial review of administrative decisions. As noted by Professor Davis in his authoritative treatise, Administrative Law Treatise, Section 29.06, at 144,

> The question whether a court which sets aside an administrative finding has substituted judgment as to credibility of witnesses or has merely applied the reasonableness test to the question of credibility is exceedingly elusive.

The truth of the matter is that said "substitution" has in fact been condoned.

> Decisions by administrative factfinders as to demeanor and credibility will be overturned by this Court only when the evidence to the contrary is overwhelmingly compelling. NLRB v. Bausch & Lomb, Inc. (C.A. 2, 1975) 526 F.2d 817, 822.

> We . . . firmly believe from an examination of the entire record, that the evidence of the seven employees or ex-employees is more credible than that of [the one]. [Citations] We reach this decision in full awareness of the rule that the question of credibility of witnesses and the weight to be given their testimony is primarily one for determination by the trier of facts. [Citations] But the rule is not one to be applied mechanically, for if we were to so apply it, the ... reviewing court would be compelled to sustain any finding as to which testimonial evidence was conflicting. [Citation] This case is one in which we feel that the record as a whole requires that we disregard the credibility findings of the Hearing Officer and the Board, and we, therefore, reject them. NLRB v. Payless Chashway Lumber Store (C.A.8, 1974) 508 F.2d 24, 27-28.

Similarly, the record as a whole, present in this case, as demonstrated above, requires that Hearing Officer Biggers' credibility findings be rejected. Such an action is not without precedent and certainly not devoid of the considerations found to exist in NLRB v. Payless Chashway Lumber Store, supra.

Acceptance of the hearsay evidence from the clerks instead of their testimony at the hearing, on the grounds the former was more credible, was arbitrary and capricious. Mr. Scroggins testified fully and completely that petitioner was not involved in the scheme. However, on the advice of his counsel, Mr. Scroggins refused to testify at the hearing as to his own involvement and asserted his privilege against self-incrimination. (T.R. 297-304). The privilege against self-incrimination may be asserted in administrative proceedings. Murphy v. Waterfront Com'n. (1964) 378 U.S. 52.

It was totally arbitrary and capricious in the face of Mr. Scroggins' assertion of the privilege against self-incrimination to have found that his hearsay statements were more credible than his testimony at the hearing. Mr. Scroggins' assertion of his privilege was presumtively due to his genuine fear

that any statement which he made about his own personal involvement would have incriminated him, rather than due to any want of credibility. The dilemna which Mr. Scroggins faced cannot be arbitrarily sorted out by capriciously preferring his hearsay statements over his actual testimony at the hearing. A determination was required as to whether or not Mr. Scroggins was in actual danger of incriminating himself through his own testimony and whether he should have been granted immunity or a promise of non-prosecution in exchange for his testimony.

The agency preferred the hearsay statements of Mr. Gaffey over his testimony at the hearing on the grounds that,

> We do not find the inconsistencies between the witness' affidavit and testimony as to whether or not appellant promised him a reward for falsifying mail records, sufficient basis to disqualify the affidavit for lack of credibility on the part of the witness. (Appeal Review Board, R. 64, Docket entry 14).

Such inconsistencies preclude reliance upon the hearsay statements of a non-expert witness altogether. Richardson v. Perales, 402 U.S., at 404. The fifth enumerated conditions for the consideration of hear-

say in administrative proceedings set forth in Richardson v. Perales, supra, was the absence of inconsistency. There, the requisite absence of inconsistency was among the five specialists who examined the claimant. Here, the presence of inconsistency appears in the testimony and hearsay statements of the very witness upon whom the agency relied in part to supply evidence to support its decision to discharge petitioner.

Again, the agency simply capriciously preferred the hearsay statements of Clerk Gaffey. At the hearing, Mr. Gaffey appeared with his attorney and claimed his privilege against self-incrimination. (T.R. 294-95). Mr. Gaffey testified that the statements in his affidavit to the effect that the petitioner had promised him a Quality Step Increase to falsely weigh the mail was incorrect. (T.R. 288). Again, no reasonable decision was made to ascertain if Mr. Gaffey had a valid basis for asserting the privilege or if he had waived it.

Clerk Whitley testified to circumstances which if true rendered her statements the product of illegal coercion. (See, note 6, supra, at 21). Yet, Ms. Whitley's hearsay statements were accepted over testimony at the hearing.

On the record of the administrative proceedings, it is clear that the decision to remove petitioner from his job deprived him of due process of law. As shown above, that decision was based entirely upon evidence which was not adduced at the hearing. A decision based entirely upon hearsay statements of non-expert witnesses is tantamount to no hearing at all. Due process requires, as was stated in Goldberg v. Kelly (1970) 397 U.S. 254, at 271:

> ... the decision-maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. (emphasis added)

The Court of Appeals failed to adhere to the limitations imposed by this Court to the receipt of hearsay evidence in administrative proceedings and patently misapplied this Court decision in Richardson to a materially different and inappropriate factual context.

In Richardson, this Court did not give carte blanche approval to the use of ex parte affidavits in administrative proceedings. Rather, this Court was careful to precisely delineate the type of ex parte affidavits which could be received in administrative proceedings. This Court held that,

> We conclude that a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician. (402 U.S. at 402)

This case provides a full record upon which this Court may review the decision of the Court of Appeals. Petitioner urges the Court to grant review not only to decide the broad question of the rights of federal employees in discharge proceedings but to also provide the petitioner with his last opportunity to remove the unjust stigma of criminal wrongdoing which attaches to his name as results of his unjust removal from the federal service.

The remedy proposed by the Court of Appeals to cope with the problem of inadmissable hearsay in administrative proceedings of a motion to strike is

not an efficacious one. (Appendix at 12a). In reality, the proposed remedy is a trap for the unwary. It assumes that an actual offer of the hearsay evidence was made and that it was conditionally received. In the instant case, the hearsay affidavits were never actually offered into evidence nor marked for identification. Rather, the objectionable affidavits were made a part of the record in compliance with FPM, Subchapter 4, Section S. 4-2. This section required the inclusion of the affidavits in order that the agency satisfy its burden of giving notice of all reasons for the proposed adverse action in the advanced notice. The affidavits became a part of the record in satisfaction of formal procedural requirements, and not in explicit support of the agency's evidentiary burden. Thus, petitioner could hardly be expected to protect his interests by objecting to the hearsay evidence or moving to exclude it.

It is simply not fair to say in one breath that the restricted rules of evidence common to judicial proceedings are inappropriate in administrative proceedings and in the other to posit the adversarial tools used in such judicial proceedings as the remedy for the denial of fundamental rights in administrative proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

HOWARD MOORE, JR.
The London Building
160 Franklin Street
Oakland, CA 94607

Attorney for Petitioner

April, 1981

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES L. CALHOUN, Plaintiff-Appellant, v. BENJAMIN F. BAILAR, PostMaster General of the United States, Defendant-Appellee.	)	No. 78-1705 OPINION August 27, 1980

Appeal from the United States District Court
for the Northern District of California

Before: WALLACE and FARRIS, Circuit Judges, and KARLTON,* District Judge

KARLTON, J.

Plaintiff challenges his discharge for falsifying mail volume records on the ground that the administrative findings were not supported by substantial evidence. He appeals from the district court's entry of summary judgment. The issue he posits on appeal is whether or not hearsay statements, subsequently disavowed on direct examination, consti-

*The Honorable Lawrence K. Karlton, United States District Judge, Eastern District of California, sitting by designation.

tute "substantial" evidence sufficient to support the administrative determination.

This Court's review function in administrative discharge cases is limited "to a determination that the applicable procedures have been compiled with and that the dismissal was supported by substantial evidence and was not arbitrary and capricious." Alsbury v. U.S. Postal Service (9th Cir. 1976) 530 F.2d 852, 854, cert. denied 429 U.S. 828. See also 5 U.S.C. 706. We do not try the case de novo, and are limited to the record before us. Because the affidavits questioned here were admitted into evidence without objection, were not the subject of a motion to strike, and had "rational probative force" (See Richardson v. Perales (1971) 402 U.S. 389, 407-408), we now affirm.

I

FACTS

For our purposes, the facts may be briefly summarized. Plaintiff was Acting Tour II Superintendent at the Rincon Annex of the United States Post Office in San Francisco. His duties included the supervision of several postal clerks engaged in compiling and

reporting information on the volume of mail handled by various distribution operations at Rincon Annex. He was charged with the falsification of mail volume records, or with directing his subordinates to falsify the records and, after an administrative hearing and appeal, discharged.

The Notice of Removal served upon Appellant (See 5 U.S.C. 7513(b)(1)) relied upon the affidavits of four of his subordinates. Three of the affiants aver that they had either falsified records at Appellant's direction or had observed him directing others to falsify the records.[1/]

1/ The district court agruably relied upon a fifth affidavit of one Kleinman, despite an allegedly express stipulation between the attorneys for plaintiff and defendant that said affidavit would not be introduced as evidence. We need not reach this issue so long as there was substantial evidence sufficient to uphold the administrative discharge. "District Court review of agency action is generally accorded no particular deference, because the district court, limited to the administrative record, is in no better position to review the agency than the court of appeals." Asarco, Inc. v. U.S.E.P.A. (9th Cir. 1980) 616 F.2d 1153, 1161.

At the administrative hearing the officer who took the affidavits laid a proper foundation for their admission, testifying that each affiant was warned both orally and in writing of his or her constitutional rights and was given an opportunity to review and revise the statement before swearing to it. The affidavits were received into evidence without objection. No later motion to strike the affidavits was made.

On direct examination each of the affiants attempted to disavow his or her affidavit. Affiant Scroggins completely disavowed the affidavit on direct examination but refused to answer any questions on cross examination, presumably on self-incrimination grounds. Evidence was later admitted that clearly contradicted his statement on direct examination that he had never reweighed mail. Additionally, another witness, Inspector Johns, testified that Scroggins had admitted to him that he had reweighed mail at Appellant's behest.

Affiant Gaffey denied on direct his averment that he had been promised additional overtime or a step increase in salary in return for falsifying the records, but otherwise apparently affirmed his

averment that Appellant directed him to falsify records.[2/]

Affiant Whitley totally disavowed her affidavit and testified that she was coerced into signing it.

Inspector Johns was the only major witness. He testified that he had observed widespread falsification during Appellant's tenure as supervisor, and introduced statistical evidence that tended to show falsification in Appellant's unit. Other evidence corroborated Johns' testimony that falsification was occurring, although this testimony, like Johns', did not directly tie the falsification to Appellant.

As noted, Appellant did not challenge the admissibility of the affidavits at any time during the administrative process. At most, he argued the weight that should be given to the affidavits. The hearing examiner found that the affidavits were more credible evidence than the statements made on direct examination, in part because of the witnesses' refusal to answer questions put in cross examination and because

---

2/ Although it is less than wholly clear what was affirmed and what was disavowed, it appears that Gaffey did not disavow his averment that Appellant directed him to falsify records.

portions of the affidavit were corroborated by other evidence. This conclusion was sustained by the Appeals Review Board.

II

DISCUSSION

There is no question that the statements in the affidavits would constitute substantial evidence if they were introduced as direct testimony. The affidavits individually and cumulatively support a finding that Appellant was involved in the falsification of records. Indeed, Appellant concedes that the affidavits themselves would be sufficient to support a finding if they were uncontradicted. Appellant argues, however, that hearsay statements disavowed by a declarant can never supply substantial evidence. We decline to adopt such a rigid rule, both because it is unnecessary to the resolution of this case and because the substantial evidence test is quintessentially a case-by-case analysis requiring review of the whole record. See K. Davis, Administrative Law of the Seventies (1976) §14.11. Nevertheless, the case does raise important and difficult questions concerning the procedure for dealing with administrative hearsay evidence.

We begin with a recognition that strict rules of evidence do not apply in the administrative context. See Marlowe v. Immigration and Naturalization Service (9th Cir. 1972) 457 F.2d 1314, 1315 (per curiam); Navarette-Navarette v. Landon (9th Cir. 1955) 223 F.2d 234, 237, cert. denied 351 U.S. 911. Indeed, the Administrative Procedure Act provides that "Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. §556(d). (Emphasis added) See K. Davis, Administrative Law Treatise §14.05. Applicable regulations provide that "Rules of evidence are not applied strictly. . . ." 5 CFR §771.116(f)(3).

Perhaps the classic exception to strict rules of evidence in the administrative context concerns hearsay evidence. Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the admissibility of hearsay evi-

dence is that it bear satisfactory indicia of reliability. We have stated the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair. See Hoonsilapa v. Immigration and Naturalization Service (9th Cir. 1978) 575 F.2d 735, 738, modified 586 F.2d 755; Marlowe v. Immigration and Naturalization Service, supra; Martin-Mendoza v. Immigration and Naturalization Service (9th Cir. 1974) 499 U.S. 984. See also Richardson v. Perales, supra at 407-408.[3/]

Thus, it is not the hearsay nature per se of the proffered evidence that is significant, it is its probative value, reliability and the fairness of its use that are determinative. Richardson v. Perales, supra, illustrates the appropriate analysis. In that case the issue was whether physicians' written reports of the medical examinations they had made of a disability claimant could constitute substantial evidence to support a finding of nondisability "when

3/ Appellant's reliance on National Labor Relations Board cases is misplaced since those actions are guided by 29 U.S.C. 160(b) which requires that "so far as practicable" rules of evidence should be followed. See NLRB v. Amalgamated Meat Cutters (9th Cir. 1953) 202 F.2d 671, 673; 32 A.L.R.Fed. 838

the claimant objects to the admissability of those reports and when the only live testimony is presented by his side and is contrary to the reports." Id. at 390 (Emphasis added). The Court rejected a rigid rule and held that the proffered hearsay evidence could constitute substantial evidence. In doing so, the Court explained that there could be no blanket rejection of administrative reliance on hearsay evidence irrespective or reliability and probative value. Id. at 407-408.[4/]

Although Richardson arose in the context of a Social Security hearing, various courts have followed its reasoning to hold that hearsay, if reliable and credible, could constitute substantial evidence in a variety of administrative settings. See, e.g.

4/ Richardson expressly rejected any contrary holding that might be distilled from dicta in Consolidated Edison Co. v. NLRB (1938) U.S. 197, 229-230. In Willapoint Oysters v. Ewing (9th Cir. 1949) 174 F.2d 676, cert.denied 338 U.S. 860, rehearing den. 339 U.S. 945, this Court relied upon Consolidated Edison to hold that hearsay alone, or even hearsay corroborated by a mere scintilla could never provide substantial evidence to support an administrative finding. Id. at 690-691. Richardson, of course, clearly disapproves such a rule.

McKee v. United States (Ct.Cl. 1974) 500 F.2d 525, 528 (Board of Contract Appeals); Reil v. United States (Ct.Cl. 1972) 456 F.2d 777, 780 (Civil Service Commission employee discharge); School Board of Broward City v. HEW (5th Cir. 1976) 525 F.2d 900, 905-907 (challenge to order of Department of HEW); but Cf. Bethlehem Steel Corp. v. Clayton (5th Cir. 1978) 578 F.2d 113.

We too reject any per se rule that holds that hearsay can never be substantial evidence. To constitute substantial evidence, hearsay delcarations, like any other evidence, must meet minimum criteria for admissability--it must have probative value and bear indicia of reliability. Although no bright line test can be established, cases isolate a number of factors that may be helpful in such an analysis. First, as Richardson teaches, the independence or possible bias of the declarant must be considered as well as the type of hearsay material submitted. In Richardson, the Court laid great stress on the fact that the reports were independent medical reports routinely prepared and submitted in disability cases. Id. at 402-407. Other factors that should be considered are whether the statements are signed and sworn to as opposed to anonymous, oral, or un-

sworn (See, e.g. Martin-Mendoza v. Immigration and Naturalization Service, supra; McKee v. U.S., supra), whether or not the statements are contradicted by direct testimony (School Board of Broward City v. HEW, supra; Jacobowitz v. U.S. (Ct.Cl. 1970) 424 F.2d 555), whether or not the declarant is available to testify, and, if so, whether or not the party objecting to the hearsay statements subpoenaes the declarant (See Richardson v. Perales, supra), or whether the declarant is unavailable and not other evidence is available (Martin-Mendoza v. Immigration and Naturalization Service, supra; McKee v. U.S., supra), the credibility of the declarant if a witness, or of the witness testifying to the hearsay (Reid v. U.S., supra), and finally, whether or not the hearsay is corroborated. Although not controlling, the Federal Rules of Evidence 803(24) standards for the admission of hearsay not specifically covered by any exception but bearing "circumstantial guarantees of trustworthiness" may be of assistance.

There remains only the question of the appropriate vehicle for application of these factors. As noted, hearsay evidence, once admitted, may be relied upon by the agency in many circumstances. The test of

reliability requires an examination of many factors including credibility. Reviewing courts may take the record as they find it in administrative cases and thus have no opportunity to develop the record. A rule which requires administrative consideration of probative value and reliability in the first instance comports with common sense and the limited review of administrative actions. Such a rule would also comport with the general rule that hearsay admitted without objection is ordinarily given its normal probative effect. See K. Davis, Administrative Law Treatise §14.05 at 275 n.8; Cf. Hayden v. Chalfant Press, Inc. (9th Cir. 1960) 281 F.2d 543, 548. See generally 79 ALR 2d 890.

We therefore hold that hearsay evidence admitted without objection or later motion to strike may constitute substantial evidence in like manner as any other evidence. This rule encourages the full development of the record and allows the administrative examiner to determine questions of reliability and probative value in the first instance. If the hearing examiner overrules an objection or a motion to strike, the reviewing court is nonetheless presented with a developed record.

We note that a motion to strike is an entirely appropriate means of raising the question of whether hearsay, although admissible ab initio, should nonetheless be stricken because it will form the basis of the decision and is insufficiently reliable for that purpose. Since some of the factors relevant to determining the reliability of hearsay include whether or not it is contradicted or corroborated, as well as whether witnesses are credible, objection need not be made at the time the hearsay evidence is proffered. A motion to strike made at the close of evidence allows the hearing examiner to consider the entire record. Cf. Hayden v. Chalfont, Press, Inc., supra. Additionally, a motion to strike at the close of the evidence provides the Administrative Law Judge with a full opportunity to evaluate the centrality of the hearsay to the disposition of the matter. Clearly, the more central the hearsay is to the agency's case, the more critical the question of reliability may become. In Richardson v. Perales, supra, the Court listed nine cumulative factors that indicated reliability; while there is nothing magical in the number, it is important that the Administrative Law Judge critically examine the issues of fairness and relia-

bility on the record so that reviewing courts can determine from the record that the duty has been discharged.

In the present case, no objection was made to the admission or consideration of the hearsay affidavits at any stage of the administrative proceedings. Accordingly, we must give the affidavits their natural probative effect without regard to their hearsay character. As such, the affidavits clearly provide substantial evidence to support the discharge. Although the affidavits are contradicted and partially repudiated by other testimony, we have long held that credibility issues should be resolved by the trier of fact and not be disturbed on appeal (See, e.g. Young Ah Chor v. Dulles (9th Cir. 1959) 270 F.2d 338), and that where "there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made." Rhinehart v. Finch (9th Cir. 1971) 438 F.2d 920, 921.[5/]

5/ Obviously in so saying we do not mean to suggest that we would weigh the evidence in the same manner as the administrative examiner did or that we would arrive at the same conclusion. Moreover, we do not suggest that had the objection been raised either the hearing examiner or this court would have arrived at the same conclusion as to whether the affidavits did possess sufficient indicia of reliability so that the decision could properly rest upon them.

Accordingly, the judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES L. CALHOUN, Plaintiff-Appellant, v. BENJAMIN F. BAILAR, PostMaster General of the United States, Defendant-Appellee.	)	No. 78-1705 ORDER January 6, 1981

Appeal from the United States District Court
for the Northern District of California

Before: WALLACE and FARRIS, Circuit Judges, and KARLTON,* District Judge

KARLTON, J.

Appellant has previously appeared before this Court challenging his discharge from the U.S. Postal Service for falsifying mail volume records. On appeal from the district court's entry of summary judgment the appellant argued that certain hearsay statements did not constitute "substantial" evidence sufficient to support the administrative determination. We affirmed

* The Honorable Lawrence K. Karlton, United States District Judge, Eastern District of California, sitting by designation.

the district court because the affidavits in question were admitted into evidence without objection, were not the subject of a motion to strike, and had "rational probative force" within the meaning of Richardson v. Perales, 402 U.S. 389, 407-08 (1971). Appellant has now filed a Petition for Rehearing before this Court and offers two arguments in support of that petition. First, he asserts that this Court's ruling in the present case is in direct conflict with Richardson v. Perales, supra. Second, the appellant argues that the hearsay affidavits in question were never offered into evidence nor was he provided the opportunity to object to their admission. Because this Court properly applied Richardson v. Perales, supra, and because the appellant has not previously raised the issue of whether the affidavits were properly admitted into evidence, the petition must be denied.

The appellant asserts that in Richardson v. Perales, supra, the Supreme Court ruled that ex parte affidavits could not be used to determine the existence of substantial probative evidence where they were inconsistent with other evidence or where the court could find bias in the affidavits' source. This is a mis-

statement of the holding in that case. Rather, Perales states the rule that in the administrative hearing context hearsay is admissable if it is reliable and probative. Richardson v. Perales, supra at 407-08. That is the rule which we relied upon in this case (See Opinion p.2). Moreover, that is the interpretation which has been consistently applied in this Circuit. Marlowe v. Immigration and Naturalization Service, 457 F.2d 1314, 1315 (9th Cir. 1972); See, Hoonsilapa v. Immigration and Naturalization Service, 575 F.2d 735, 738 (9th Cir. 1978), modified at 586 F.2d 755 (9th Cir. 1978); Trias Hernandez v. Immigration and Naturalization Service, 528 F.2d 366, 369 (9th Cir. 1975); and Martin-Mendoza v. Immigration and Naturalization Service, 499 F.2d 918, 921 (9th Cir. 1974), cert.denied 419 U.S. 1113, rehearing denied 420 U.S. 984 (1975).

The appellant also argues that the hearsay affidavits in question were never actually offered into evidence and thus he was not provided an adequate opportunity to object to their admission into evidence. The appellant has not challenged the admissability of these afficavits at any time during the administrative or judicial proceedings regarding his discharge. At

most, he has contested the weight that should have been afforded the affidavits. Assertion of these previously unraised claims now comes too late in the day and does not warrant or require our present consideration.[1/] See Jamestown Farmers Elevator, Inc. v. General Mills, Inc., 552 F.2d 1285, 1296 (8th Cir. 1977); Bullock v. Mumford, 509 F.2d 384, 388 (D.C. Cir. 1974). Moreover, were we to now consider appellant's untimely claims the orderly process of appellate review would be seriously threatened.

Accordingly, the Petition for Rehearing is denied.

1/ Because the issue was not raised in a timely fashion we need not consider the propriety of the process by which the affidavits in question became part of the evidentiary record in the present case.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES L. CALHOUN, Plaintiff, v. BENJAMIN F. BAILAR, PostMaster General of the United States, et al. Defendants.	CIVIL NO. C-77-0989-RHS ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT AND DENYING OTHER MOTIONS February 28, 1978

This case came before the Court on the defendants' motions for Summary Judgment and the plaintiff's motion for Summary Judgment and motion to compel discovery. Those issues have been briefed and argued and counsel have been afforded the opportunity for argument. The Court being fully informed in the premises;

IT IS ORDERED that the defendant's motion for Summary Judgment is granted and the plaintiff's motion for Summary Judgment, and discovery motion are denied.

The defendants shall prepare an appropriate judgment with costs.

APPROVED AS TO FORM:
this date: (2/23/78)

(Howard Moore, Jr.)
Plaintiff's Attorney

UNITED STATES DISTRICT JUDGE